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No. 86-307

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

JERRY G. BRENNAN,

Petitioner,

v.

DEPARTMENT OF HEALTH AND
HUMAN SERVICES,

Respondent,

SUPPLEMENTAL BRIEF OF PETITIONER

JUDGE JERRY G. BRENNAN
Box 1355
Middlesboro, KY 40965

Petitioner
Pro Se

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On September 5, 1986, I filed a pro se petition for writ of certiorari to the United States Circuit Court of Appeals for the Federal Circuit. The Clerk of Court accepted the petition but questioned whether the petition was filed in time and asked for this supplemental brief.

On April 3, 1986, the court of appeals issued its opinion and judgment from which

I have filed a writ of certiorari. On April 17, 1986, I filed a timely petition for rehearing and suggestion for rehearing en banc. On June 2, 1986, the court denied the petition for rehearing. On June 10, 1986, the court declined the suggestion for rehearing en banc.

A petition for writ of certiorari in a civil action must be filed within ninety days after entry of the judgment or decree. 28 U.S.C. § 2101(c). The time for filing the petition for writ of certiorari runs from the date the judgment or decree sought to be reviewed is rendered. Sup. Ct. R. 20.4. However, if a petition for rehearing is timely filed, the time for filing the petition for writ of certiorari runs from the date of the denial of rehearing. Ibid. Before it became a rule of the Court, this was "a traditional and virtually unquestioned practice." United States v. Healy, 376 U.S. 75, 79 (1964)

(Harlan, J.). "It would be senseless for this Court to pass on an issue while a motion for rehearing is pending below . . . ." Id. at 80.

A timely filed petition for rehearing en banc also extends the time for filing a petition for certiorari. Id. at 78.[1] It would be equally senseless for this Court to require that a petition for a writ of certiorari must be filed while a suggestion for rehearing en banc is pending below, with jurisdiction[2] over the merits in both

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[1] See the Court's reference, 376 U.S. at 78, to Panico v. United States, 375 U.S. 29, where a petition for rehearing en banc tolled the time for filing a petition for certiorari, and Genovese v. United States, 375 U.S. 32, where a petition for rehearing and rehearing en banc extended the time.

[2] Until the court of appeals decides the suggestion for rehearing en banc, the "entertaining of the petition keeps the court's jurisdiction alive . . . ." Aspen Mining & Smelting Co. v. Billings, 150 U.S. 31, 37 (1893).

courts, which "could, in some cases, impose an added and unnecessary burden of adjudication upon this court." Id. at 80.

CONCLUSION

Since United States v. Healy clearly controls, and no rule of this Court states to the contrary,[3] the time for filing the

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[3] Rule 35 of the Federal Rules of Appellate Procedure states that: "The pendency of [a suggestion for rehearing en banc] shall not affect the finality of the judgment of the court of appeals . . . ." Rule 1 of those rules states, however, that: "These rules govern procedure in appeals to United States courts of appeals . . . ." It is submitted, in equity, that those rules should not govern procedure for writs filed in this Court.

Petitions for rehearing come from the equity courts. Morse v. United States, 270 U.S. 151, 153 (1926). Equity has been "regarded as an appanage of the Crown's prerogative." 2 Moore, Federal Practice, (2d ed. 1980), p. 2-8 n. 12. It would be anamolous indeed to deny equity to a petitioner challenging the Crown's prerogative, following the glorious path set by Sir Edward Coke. See Bowen, The Lion and Throne.

petition for writ of certiorari started running on June 10, 1986, when the court denied the suggestion for rehearing en banc. The petition for writ of certiorari was, therefore, timely filed.

Respectfully submitted,

JERRY G. BRENNAN, pro se

Dated: September 11, 1986